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Attorneys for Media Intervenors Associated Press, CNN, *Deseret Morning News*, *The Salt Lake Tribune*, *The Spectrum*, *The Daily Herald*, KSL-TV, KUTV 2 News, the Utah Media Coalition, and the Utah Headliners Chapter of the Society of Professional Journalists

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WARREN STEED JEFFS, Defendant. ASSOCIATED PRESS, CNN, DESERET NEWS PUBLISHING COMPANY, publisher of the *DESERET MORNING NEWS*, *THE SALT LAKE TRIBUNE*, *THE SPECTRUM*, *THE DAILY HERALD*, BONNEVILLE INTERNATIONAL CORPORATION d/b/a KSL-TV, FOUR POINTS MEDIA GROUP OF SALT LAKE CITY, INC. d/b/a KUTV 2 NEWS, THE UTAH MEDIA COALITION, and THE UTAH HEADLINERS CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, Intervenors.	**MEDIA INTERVENORS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR CLOSURE OF DEFENDANT'S MOTIONS IN LIMINE AND SUPPRESSION HEARINGS** **(Filed Under Seal)** Criminal No. 061500526 Judge James L. Shumate

Media Intervenors the Associated Press, CNN, *Deseret Morning News*, *The Salt Lake Tribune*, *The Spectrum*, *The Daily Herald*, KSL-TV, KUTV 2 News, the Utah Media Coalition, and the Utah Headliners Chapter of the Society of Professional Journalists (collectively the "Media Intervenors"), through their undersigned counsel, respectfully submit this Memorandum in Opposition to Defendant's Motion for Closure of Defendant's Motions in Limine and Suppression Hearings.

INTRODUCTION

Mr. Jeffs has asked this Court to impose the extraordinary remedy of closing the courtroom for the entirety of the hearing on his six motions in limine, and to keep all of those motions under seal. All of the motions, according to Mr. Jeffs, contain evidence so inflammatory and prejudicial that it will be impossible for this Court to empanel an impartial jury if the evidence is released to the public. Relying on broad and unsubstantiated allegations of prejudice, and the fact that the evidence at issue may not be introduced at trial, Mr. Jeffs asserts that he has overcome the heavy constitutional presumption in favor of access and requests that the court file be sealed and these proceedings be held in secret.

Mr. Jeffs' motion is not well taken. All suppression hearings involve evidence that may not be introduced at trial, yet the public still has a presumptive constitutional right of access to those proceedings because they represent a critical stage in any criminal case. To overcome that presumptive right of access, Mr. Jeffs must do more than simply assert that "negative publicity"

will make it impossible for him to receive a fair trial. He must make a particularized showing that permitting access to this specific evidence will substantially endanger his right to a fair trial, and he must show that there are no less restrictive alternatives to preserve his fair trial rights.

Mr. Jeffs' memorandum does not come close to satisfying this standard. First, the evidence he seeks to suppress, and which he asserts justifies closure of the courtroom doors, is hardly a bombshell. Even before this case began, Mr. Jeffs was the subject of considerable news reporting and publicity. It is no secret that Mr. Jeffs is an alleged polygamist, that he acted as the controlling and authoritarian leader of the FLDS community, and that its members are allegedly involved in arranged, underage, and sometimes abusive plural marriages. It is likewise no secret that Mr. Jeffs renounced his role as the prophet of the FLDS church, as that fact was widely reported several months ago in the local and national press. Nearly all of the evidence that Mr. Jeffs seeks to suppress, and which he claims justifies closure, is simply cumulative of this information already in the public domain.[1] Indeed, the only possible new allegation is the assertion that Mr. Jeffs committed some unidentified "immoral act" more than thirty years ago –

[1] Notably, four of the five State witnesses whose testimony Mr. Jeffs seeks to exclude – Richard Holm, Lori Chatwin, Andrew Chatwin, and Jethrow Barlow – have themselves been the subject of extensive news coverage and have been quoted repeatedly in newspaper articles about Mr. Jeffs and the FLDS Church. Attached hereto as Exhibit "A" are **forty-two** articles in which these four individuals are quoted and referenced, often making the same criticisms of Mr. Jeffs as the testimony Mr. Jeffs claims should be secret. Some of these criticisms go well beyond the State's evidence, including repeated allegations of underage marriage and abuse, and accusations that Mr. Jeffs is a "Hitler-like dictator," a "phony prophet," and a "madman." Also included in Exhibit "A" is the November 22, 2006 news article about the preliminary hearing in this case, which includes extensive coverage on the allegations that Mr. Jeffs has been involved in abusive underage marriages. The supposedly prejudicial assertions in the State's evidence, which Mr. Jeffs claim justifies closing the courtroom, pale by comparison.

a vague and isolated fact that Mr. Jeffs concedes has virtually no bearing on the jury's determination of guilt or innocence in this case.

While the evidence at issue may be critical of Mr. Jeffs, or even embarrassing, it is little more than a drop in the bucket given the overall amount of pretrial publicity in this case. It is not the type of explosive, case-altering evidence (such as a confession) that could irretrievably taint the jury pool. Even if the evidence were not already in the public domain, Mr. Jeffs has not satisfied his burden of showing that his right to a fair trial would be substantially endangered if the public's constitutional right of access is upheld. As a result, his motion should be denied.

Moreover, Mr. Jeffs *does not even address* the second prong of the access test – whether less-restrictive alternatives, such as voir dire, juror questionnaires, an enlarged jury venire, peremptory challenges, admonitions to the jury, continuance, or change of venue, are available to protect his fair trial rights. Because it is Mr. Jeffs' burden to demonstrate that these alternatives are inadequate, his failure to do so is fatal to his motion. As both this Court and the Utah Supreme Court have previously recognized, it is by using these time-tested tools that the court ensures a fair and impartial jury, not by conducting all pretrial proceedings in secret.

This is not the first high-profile case in Utah, nor even the one that has generated the most publicity. Yet, time and again, judges have still managed to empanel impartial juries and provide the defendant with a fair trial, all while preserving the public's constitutional right of access. This is a proceeding of substantial public interest, and any closure should be based on facts that

are truly extraordinary. Here, there are no such facts. There is simply cumulative and unflattering evidence that the defendant would like to keep secret. Because Mr. Jeffs has failed to make the particularized showing required to justify closure, his motion should be denied.

ARGUMENT

I. THE PUBLIC AND THE PRESS HAVE A PRESUMPTIVE CONSTITUTIONAL RIGHT OF ACCESS TO PRETRIAL CRIMINAL PROCEEDINGS AND DOCUMENTS, INCLUDING SUPPRESSION MOTIONS AND HEARINGS.

A. Public Access to Pretrial Evidentiary Hearings is Essential Because Such Hearings are a Critical, and Sometimes Determinative, Stage in Criminal Proceedings.

As Mr. Jeffs acknowledges, the public and the press enjoy a presumptive constitutional right of access to pretrial criminal proceedings, including pretrial hearings dealing with exclusion of evidence. The United States Supreme Court and the Utah Supreme Court have affirmed this constitutional right of access in a variety of contexts. *See, e.g., Waller v. Georgia*, 467 U.S. 39 (1984) (applying First Amendment open courts analysis to pretrial suppression hearing); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735 (1986) ("*Press-Enterprise II*") (preliminary hearings); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819 (1984) ("*Press-Enterprise I*") (criminal voir dire proceedings); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613 (1982) (criminal trial involving child victim of rape); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814 (1980) (criminal trial); *State v. Archuleta*, 857 P.2d 234 (Utah 1993) (court records filed in connection with preliminary

hearing); *Society of Professional Journalists v. Bullock*, 743 P.2d 1166 (Utah 1987) (competency hearing); *Kearns-Tribune v. Lewis*, 685 P.2d 515 (Utah 1984) (preliminary hearings).

The open court fosters and protects important societal values. It enhances the quality and safeguards the integrity of the fact-finding process, *Globe Newspaper Co.*, 102 S. Ct. at 2619; enhances basic fairness and the appearance of fairness in the proceedings, *Press-Enterprise II*, 106 S. Ct. at 2743; fosters public confidence in the judicial process and acceptance of its results, *Press-Enterprise I*, 104 S. Ct. at 822; acts as a check on the judiciary, *Richmond Newspapers*, 100 S. Ct. at 2823; and allows the public to participate in government. *Id.*, 100 S. Ct. at 2833 (Brennan, J., concurring). Although members of the public may not attend criminal proceedings in large numbers, the news media acts as the public's surrogate in attending such proceedings and reporting to the public, thus educating the public. *Id.*, 100 S. Ct. at 2825.

Conversely, denying public access to judicial proceedings precludes public scrutiny of the judicial process, creating an impression of unfairness and secrecy, even though the proceedings may in fact be imminently fair. *See* M. Fowler & D. Leit, Media Access to the Courts: The Current Status of the Law (American Bar Association, Section of Litigation, 1995) at 1; *see also Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569, 576 (D. Utah 1985) (Winder, J.) ("Openness safeguards our democratic institutions. Secrecy breeds mistrust and abuse."), *appeal dismissed and remanded on other grounds*, 832 F.2d 1180 (10th Cir. 1987).

With respect to pretrial motions to limit or exclude evidence, the United States Supreme Court has specifically addressed the importance of those proceedings and rejected the argument made by Mr. Jeffs that such hearings are not as important as the trial. In its unanimous opinion in *Waller v. Georgia*, the Court stated as follows:

> As several of the individual opinions in *Gannett* recognized, suppression hearings often are as important as the trial itself. In *Gannett*, as in many cases, the suppression hearing was the *only* trial, because the defendants thereafter pleaded guilty pursuant to a plea bargain. . . . The need for an open proceeding may be particularly strong with respect to suppression hearings.

Id. at 46-47 (citations omitted; emphasis in original). *See also* C. Dienes, L. Levine & R. Lind, Newsgathering and the Law § 3-1(a)(2) at p. 81-82 (Michie 1997) ("A decision that evidence is admissible will often be followed by a guilty pleas. A decision that evidence is constitutionally inadmissible often precludes further prosecution.").

These same interests in access were echoed by the United States Court of Appeals for Second Circuit in *In Re Herald Tribune Co.*, 734 F.2d 93 (2d Cir. 1984):

> It makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases. There is a significant public benefit to be gained from public observation of a criminal proceeding, including pretrial suppression hearings that may have a decisive effect upon the outcome of a prosecution.

Id., 734 F.2d at 98.

In light of these policy concerns, numerous courts have rejected attempts to close pretrial evidentiary hearings for failure to satisfy the rigorous First Amendment standard. *See Jackson v.*

Turner, No. 97-4045, 1998 U.S. App. LEXIS 27653 (6th Cir. Oct. 23, 1998) (rejecting criminal defendant's claim that his Sixth Amendment right to a fair trial was violated by trial court's refusal to close pretrial suppression hearing); *United States v. Criden*, 675 F.2d 550 (3rd Cir. 1982) (vacating order closing suppression hearing in the prosecution of four "Abscam" defendants); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982) (noting "increasing importance of pretrial procedures in the modern era" and rejecting effort to close suppression hearing to determine admissibility of evidence based on alleged misconduct by FBI agents); *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982) ("The trial court should begin its consideration with the assumption that a pretrial hearing be conducted in open court unless those seeking closure carry their burden to demonstrate a strict and inescapable necessity for closure."); *Ex parte Hearst-Argyle Television, Inc.*, 631 S.E.2d 86 (S.C. 2006) (reversing a trial court order closing a pre-trial suppression hearing in a capital murder case because closure would not prevent additional publicity and did not satisfy constitutional test); *People v. LaGrone*, 838 N.E.2d 142 (Ill. App. Ct. 2005) (reversing a trial court order denying public access to hearing on motions in limine).

This same result has also been reached by other trial courts in Utah, which have rejected similar requests of criminal defendants in high-profile cases to close their pretrial evidentiary hearings to the public and the press. For example, in *State v. Weitzel*, Case No. 991700983 (2nd Dist. Ct., Davis County, State of Utah), Judge Thomas L. Kay found that the public had a

constitutional right of access to pretrial evidentiary hearings, and denied defendant Dr. Robert Allen Weitzel's motion to close the hearing on ***eleven motions in limine*** filed by Dr. Weitzel, including motions in limine, like the motion at issue here, seeking to exclude evidence of other crimes, wrongs, or bad acts. *See* Order Denying Defendant's Motion to Close Pretrial Evidentiary Hearings to the Public and the Press (June 2, 2000), attached hereto as Exhibit "B". Similarly, in *State v. Rettenberger*, Case No. 97170057 (2nd Dist. Ct., Davis County, State of Utah), Judge Jon M. Memmott denied defendant's request to close his pretrial suppression hearing (to suppress his alleged confession) to the public and press. *See* Ruling on Defendant's Motion for Closed Hearing (April 29, 1997), attached hereto as Exhibit "C".

Although the defendants in the *Weitzel* and *Rettenberger* cases both argued that their Sixth Amendment right to a fair trial would be violated by conducting open and public pretrial evidentiary hearings, the trial courts found, as the Court should here, that closure would not protect the compelling interest asserted because the information sought to be concealed was already in the public domain, and that less restrictive alternatives were available to protect the compelling interest.

Mr. Jeffs cites virtually no authority in support of his attempt to close the hearing on his motions in limine. In fact, the only case he cites, *Gannet Co. v. DePasquale,* 443 U.S. 368 (1979), was decided before the Supreme Court's recognition of the public's right of access to pretrial proceedings in *Press-Enterprise* and its recognition of the importance of open

suppression hearings in *Waller v. Georgia. See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819 (1984); *Waller v. Georgia*, 467 U.S. 39 (1984). Indeed, in *Waller*, the Court noted that despite the fact that the *DePasquale* opinion did not directly reach the question of whether a right of access "extends to a pretrial suppression hearing . . . a majority of the Justices concluded that the public had a qualified constitutional right to attend such hearings." *Waller*, 467 U.S. at 45. That governing precedent applies here.

B. The Same Right of Access Applies to Documents Filed in Connection with Suppression Hearings, Such As Mr. Jeffs' Motions in Limine.

Even though Mr. Jeffs concedes that the public has a constitutional right of access to pretrial evidentiary hearings, he claims that a different standard applies to judicial records filed in connection with those hearings, contending that there is no controlling authority supporting a constitutional right of access to such records.[2]

On this point, Mr. Jeffs is simply mistaken. As this Court has already recognized in unsealing documents relating to Mr. Jeffs' competency, the public does have a presumptive right of access to such documents, as reflected in Rule 4-202.04 of the *Utah Code of Judicial Administration*, which specifically adopts the *Press-Enterprise* test for access to documents filed

[2] This assertion is largely academic, since Mr. Jeffs concedes, as he must, that "it is clearly established that court documents are covered by a common law right of access," and that "[s]uppression motions have historically been open to inspection by the press and the public." *United States v. McVeigh*, 119 F.3d 806, 811, 813 (10th Cir. 1997). Even if the access right were based in the common law rather than the First Amendment, Mr. Jeffs has still failed to overcome that right.

with the court. That rule permits the file to be sealed only where the interests favoring closure outweigh the interests in access and where there are "no reasonable alternatives to closure sufficient to protect the interests favoring closure." Rule 4-202.04(3). This rule makes no distinction between documents relating to in limine motions and other pretrial proceedings. It applies equally to all documents in the court file, which includes the motions here and their attached exhibits. *See* also Rule 4-202.02(2)(A)-(C) (records become public when they are part of "casefiles," "the official court record or official minutes of an open court hearing and any transcript of them," or "exhibits which have been offered, identified, marked and admitted in any proceeding[.]").

Moreover, as the Utah Supreme Court has explained, there is no reasonable basis to distinguish between access to a hearing and access to documents relating to that hearing, particularly where those documents will be critical to the court's decision:

> ***We see no reason to distinguish generally between access to a preliminary hearing and the documents filed in relation to that hearing.*** As one scholar noted,"Access to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings. . . . The availability of documents means that graft and ignorance will be more difficult to conceal." Disclosing documents used by courts in reaching a decision in a preliminary hearing will discourage decisions based on improper means and will promote conscientious performance by all officials involved in the criminal justice system. Therefore, providing a presumptive right of access to documents filed in connection with preliminary hearings can play a significant positive role in the functioning of that process.

Archuleta, 857 P.2d at 238-39 (ellipses in original; citation omitted; emphasis added).

Though Mr. Jeffs observes that *Archuleta* involved a preliminary hearing, rather than an evidentiary hearing, he fails to explain why the *Archuleta* court's reasoning does not apply with equal force. Because "suppression hearings are often as important as the trial itself," *Waller*, 104 S. Ct. at 2215-16, and because "[a]ccess to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings," *Archuleta*, 857 P.2d at 238-39, all of the same interests in access apply to the motions in limine filed by Mr. Jeffs. Those motions and supporting memoranda should be unsealed.

In asserting that the public should be denied access to documents in this case, Mr. Jeffs relies almost entirely on *United States v. McVeigh,* 119 F.3d 806 (10th Cir. 1997), in which the Court affirmed a trial court's sealing of certain documents relating to a suppression hearing for unlawfully obtained evidence. Contrary to Mr. Jeffs' implication, the *McVeigh* court did *not* hold that there is no First Amendment right of access to suppression motions; rather, it assumed that such a right existed and found that the right had been overcome. On a more fundamental level, however, the *McVeigh* decision is distinguishable from this case in two critical ways.

First, the court's allowance of sealed documents was significantly based on the fact that the court "held a four-day long public suppression hearing[.]" *Id.* at 813. Because "the suppression hearing itself was open," the court found that "[a]ccess to the redacted information is not needed for a full understanding of the court's decision on the motion to suppress[.]" *Id.* As the court noted, "[t]his is not a case where the district court has sealed entire documents or held

closed pre-trial proceedings." *Id.* at 815. In stark contrast, that is exactly what Mr. Jeffs has requested here – wholesale closure of the entire in limine hearing coupled with sealing of the court file, effectively denying the public any means of understanding or evaluating the court's decision. Nothing in the *McVeigh* decision supports such a measure.

Second, and even more decisive, the *McVeigh* court's conclusion that redacted documents need not be released to the public was predicated on the court's determination that the reasons for suppression in that case did *not* depend on the actual content of that evidence. *Id.* at 813. Rather, the court's suppression order was based on the circumstances under which the evidence was obtained – whether Mr. Nichols' interview with the FBI was unlawful, and whether the notes taken in that interview were hearsay. *Id.* at 809, 814 ("Thus, both the press and the public had ample opportunity to understand the *circumstances surrounding Nichols' statements,* and the reasons why those statements were deemed inadmissible against McVeigh.") (emphasis added).

In this case, quite to the contrary, Mr. Jeffs' motions in limine are based entirely on the *content* of the evidence he seeks to suppress. He argues repeatedly that the evidence is irrelevant and prejudicial, that it would unfairly provoke the jury's "instinct to punish," and that it should be excluded based on what it is, not how it was obtained. As Mr. Jeffs himself argues in his closure memorandum, "the fact-specific nature of the Defendant's assertions regarding the State's evidence will make it difficult to present a coherent and meritorious argument for suppression without specific reference to the statements and expected testimony." [Closure

Memo. at 8.] Consequently, if this Court chooses to exclude the evidence, its decision will necessarily be based on the content of the evidence. Unlike *McVeigh*, there is no way for the public to have a "full understanding of the court's decision on the motion to suppress" without access to the evidence itself. *Id.* at 813.

This is a public court proceeding. Mr. Jeffs has voluntarily brought these motions in limine seeking a public court ruling based on the content of the evidence. Having done so, he can hardly complain that the content of the evidence is now subject to the public's constitutional right of access. His request that both the court file and the courtroom be closed would violate that right of access and deny the public any means to observe and understand this critical phase of these proceedings.

C. Closure is Not Permissible Unless Mr. Jeffs Establishes a "Substantial Probability" of Prejudice to his Right to a Fair Trial and No Less Restrictive Alternatives to Closure Exist.

In light of the compelling constitutional interests in open criminal proceedings in general, and pretrial evidentiary hearings in particular, the United States Supreme Court and the Utah Supreme Court have imposed a heavy burden on a party seeking close such hearings to the public. In the *Kearns-Tribune* case, the Utah Supreme Court established procedures that must be followed before court proceedings may be closed. The Utah Supreme Court stated that, in an open proceeding about which the press has notice, a court considering closure must find that there is (i) a "realistic likelihood of prejudice" to other significant rights; (ii) that this prejudice

could not be avoided by other less-restrictive alternative means; and (iii) that closure would actually achieve the desired result. *Kearns-Tribune*, 685 P.2d at 522-24.

Two years after *Kearns-Tribune* was decided, the United States Supreme Court in *Press-Enterprise II* established the controlling constitutional standard by which attempts to close pretrial criminal proceedings must be measured. A court may deny public access to pretrial criminal proceedings only if three substantive requirements are met: (i) closure serves a compelling governmental interest; (ii) there is a "substantial probability" that, in the absence of closure, the compelling interest will be harmed; and (iii) there are no less-restrictive alternatives to closure that would adequately protect the compelling interest. *Press-Enterprise II*, 106 S. Ct. at 2742-43.[3] In applying this standard, the proponent of closure has the "significant" burden of establishing that the constitutional requirements are satisfied. *Kearns-Tribune*, 685 P.2d at 523.

As demonstrated below, Mr. Jeffs has failed to carry this burden in demonstrating that closure of the hearing on his motions in limine and sealing of the court file is necessary to protect

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[3] To the extent there is any difference between the "substantial probability" of prejudice standard established by the United States Supreme Court in *Press-Enterprise II* and the "realistic likelihood" of prejudice standard established by the Utah Supreme Court in *Kearns-Tribune*, this Court must apply the United States Supreme Court standard. U.S. Const. Art. VI, Sec. 2. Mr. Jeffs has failed to carry his burden under either standard in any event. In addition, Article I, section 15 of the Utah Constitution affords at least the same, and perhaps greater, free speech and free press protections as are found under the First Amendment to the United States Constitution. *See KUTV v. Conder*, 668 P.2d 513, 521 (Utah 1983); *West v. Thomson Newspapers*, 872 P.2d 999, 1015 (Utah 1994). Therefore, the First Amendment standard governing public access to pretrial criminal proceedings established by the United States Supreme Court in *Press-Enterprise II*, and since developed by the lower courts, is coextensive with the standard governing access to such proceedings under Article I, section 15 of the Utah Constitution.

his right to a fair trial, that closure would actually protect that right, and that there is no less restrictive alternative to closure that would allow Mr. Jeffs to receive a fair trial.

II. MR. JEFFS HAS NOT MET THE CONSTITUTIONAL STANDARD NECESSARY TO SEAL THE COURT FILE OR CLOSE THE HEARING ON HIS MOTIONS IN LIMINE.

Mr. Jeffs' memorandum fails to satisfy either prong of the constitutional test required for closure. He has not shown a "substantial probability" that upholding the public's right of access to the suppression hearing will prejudice his right to a fair trial, and he has not even attempted to argue that less restrictive alternatives would be insufficient to empanel an impartial jury despite pretrial publicity. These two prongs are discussed in turn.

A. Mr. Jeffs Has Not Shown that Closure of the Hearing on his Motions in Limine is Necessary to Protect His Right to a Fair Trial.

While Mr. Jeffs' Sixth Amendment right to a fair trial certainly qualifies as a "compelling interest" deserving of judicial protection, Mr. Jeffs has failed to demonstrate that conducting open and public hearings on the pending in limine motions will create a "substantial probability" of prejudice to his fair trial right. Instead, Mr. Jeffs has articulated only generalized concerns regarding pretrial media coverage of this case. Yet, pretrial publicity, even if pervasive, repeatedly has been rejected by the United States Supreme Court and numerous lower courts as the basis for restricting access to judicial proceedings. "The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right [to a fair trial]." *Press-Enterprise II*, 106 S. Ct. at 2743; *see also See Jackson v. Turner*,

No. 97-4045, 1998 U.S. App. LEXIS 27653 (6th Cir. 1998) (rejecting criminal defendant's claim that extensive pretrial publicity required closure of suppression hearing to protect his Sixth Amendment right to a fair trial); *United States v. Criden*, 675 F.2d 550 (3rd Cir. 1982) (vacating order closing suppression hearing in the widely publicized prosecution of four "Abscam" defendants). Speculation is insufficient; the defendant must demonstrate a substantial probability of prejudice in the absence of closure. No such demonstration has been made.

In *State v. Pierre*, 572 P.2d 1338 (Utah 1977), *cert denied*, 439 U.S. 882 (1978), the Utah Supreme Court addressed the defendant's claim that his trial was unfair because of pretrial publicity describing the violent acts committed upon persons in the Ogden Hi-Fi killings. The Court rejected the defendant's claim, concluding that "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." *Id.* at 1350 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 2805 (1976)). Similarly, conducting open and public hearings on the pending in limine motions will not necessarily result in an unfair trial for Mr. Jeffs. This is particularly so where, as here, much of the information sought to be shielded from public view already has been placed into the public domain and reported upon extensively by the local news media.

Moreover, the mere fact that the evidence disclosed in the suppression hearing might be ruled inadmissible at trial cannot, by itself, justify closure. All suppression hearings deal with evidence that may be ruled inadmissible. If Mr. Jeffs' position were the law, then no suppression

hearing would be open to the public, eviscerating the right of access. In addition, Mr. Jeffs' argument is predicated on the false assumption that the public's right of access is limited to the defendant's *trial*, and therefore that interest must be diminished when dealing with evidence that might not be admitted at trial. As the extensive authority cited above makes clear, the public's right of access is not limited solely to the trial, but includes all pretrial proceedings, including evidentiary hearings.

Simply put, Mr. Jeffs has fallen far short of the substantial showing necessary to overcome the constitutional right of access in this case. His generalized and diffuse concerns about pretrial publicity do not constitute the particularized showing necessary to close the courtroom, nor do they offer any reasonable explanation why the evidence at issue will make any meaningful difference when added to the expansive amount of negative information about Mr. Jeffs already in the public domain. By Mr. Jeffs' own admission, the evidence he wants to keep secret bears little relation to the actual charges against him and is largely irrelevant to these proceedings. It is not, for example, a confession to the alleged crime, where one might reasonably conclude that the jury in *this case* would prejudge Mr. Jeffs' innocence. Rather, the evidence is simply cumulative of the extensive information about Mr. Jeffs that is already in the public domain – that Mr. Jeffs is a polygamist, that he renounced his role as a prophet, and that he was the controlling leader of the FLDS church community in Hilldale and Colorado City.

As a result, Mr. Jeffs has not satisfied his substantial burden of showing that closure is necessary to protect his right to a fair trial, and his motion for closure should be denied.

B. Less Restrictive Alternatives to Closure Are Available To Protect Mr. Jeffs' Rights.

Even if the Court were to assume that public disclosure of Mr. Jeffs' in limine motions could create a substantial probability of prejudice to Mr. Jeffs' fair trial rights, closure should still be denied because any number of less restrictive alternatives are available to adequately protect those rights, including the time-tested judicial tools of voir dire, juror questionnaires, an enlarged jury venire, peremptory challenges, admonitions to the jury, continuance, or change of venue. All of these alternatives are preferable to sacrificing the public's right to observe the judicial process.

Of these available and effective alternatives, courts have found that careful and searching voir dire, coupled with carefully crafted juror questionnaires, are the preferred methods of revealing juror exposure to prejudicial pretrial publicity. *See United States v. Martin*, 746 F.2d 964, 973 (3d Cir. 1984) ("Testing by voir dire remains a preferred and effective means of determining a juror's impartiality and assuring the accused a fair trial."); *State v. Schaefer*, 599 A.2d 337, 345 (Vt. 1991) ("As a basic principle, voir dire is the normal and preferred method of combating the effects of pretrial publicity."). As the United States Court of Appeals for the Fourth Circuit observed:

> The reason that fair trials can coexist with media coverage is because there are ways to minimize prejudice to defendants without withholding information from public view. *With respect to 'the potential prejudice of pretrial publicity,' . . . voir dire is of course the preferred safeguard against this particular threat to fair trial rights . . . [and] can serve in almost all cases as a reliable protection against juror bias however induced.*

In re Search Warrant, 923 F.2d 324, 329 (4th Cir. 1991) (emphasis added). In fact, voir dire of prospective jurors was exactly the procedure recommended by the United States Supreme Court in *Press-Enterprise II*. "Through voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." *Press-Enterprise II*, 106 S. Ct. at 2735.

Judicial reliance on voir dire instead of closure of court records rests on several grounds. First, "there is somewhat of a tendency to 'frequently overestimate the extent of the public's awareness of news.'" *In re Search Warrant*, 923 F.2d at 329 (quoting *United States v. Myers*, 635 F.2d 945, 953 (2d Cir. 1980)). Trial courts have successfully selected juries despite extensive, even massive, pretrial publicity. *See, e.g., State v. Pierre*, 572 P.2d 1338, 1349 (Utah 1977), *cert. denied*, 439 U.S. 882 (1978) (extensive pretrial publicity surrounding Ogden Hi-Fi torture-slayings did not prevent impaneling of impartial jury for defendants); *In re Nat'l Broadcasting Co.*, 635 F.2d 945, 953 (2d Cir. 1980) (extensive publicity about "Abscam" case would not prevent selection of impartial jurors); *United States v. Haldeman*, 559 F.2d 31, 61-62 (D.C. Cir. 1976) (publicity surrounding Watergate scandal did not prevent fair trial), *cert. denied sub nom.*, *Ehrlichman v. United States*, 431 U.S. 933 (1977).

Second, even potential jurors aware of a case are not automatically disqualified from sitting so long as they can set aside their impressions and judge the case on the basis of the evidence presented at trial. *In re Search Warrant*, 923 F.2d at 329. The Fourth Circuit said the following in upholding the trial court's use of voir dire to detect juror exposure to pretrial publicity in the case of a defendant charged with abducting a five-year-old girl:

> The judicial system is entitled to respect the critical faculties of those citizens who give their time as jurors. *It verges upon insult to depict all potential jurors as nothing more than malleable and mindless creations of pretrial publicity.* Jurors can be skeptical about the sort of information contained in the paragraph at issue here [an affidavit in support of a search warrant] and are not necessarily naive to the fallibility of various police investigative techniques. They are also quite capable of concentrating on the evidence presented before them in open court, especially when admonished by appropriate instructions of their sober responsibility to do so.

Id. at 330 (emphasis added).

Third, even assuming that thorough voir dire, a detailed juror questionnaire, and an enlarged jury venire proved inadequate to protect against prejudicial pretrial publicity in this case, other options, such as continuance or change of venue, are still available to the Court. Although such procedures may be inconvenient and entail additional cost, they have the benefit of preserving the defendant's right to a fair trial without eviscerating the First Amendment right of the public and the news media to attend criminal judicial proceedings. *See id; see also Seattle Times v. United States District Court*, 845 F.2d 1513, 1518 (9th Cir. 1988) ("The issue is not whether a potential juror is ignorant of the case, but whether he had a preconceived idea of the

defendant's guilt or innocence. Moreover, if voir dire fails to impanel an impartial jury, the options of continuance or change of venue are still open.").

Finally, even if this Court were to conclude that some piece of evidence discussed in the suppression hearing should be discussed *in camera,* that does not justify wholesale closure of the entire hearing, which is what Mr. Jeffs' motion requests. At a bare minimum, only those specific pieces of evidence that satisfy the constitutional standard (and the Media Intervenors believe there are none here) should be discussed in a closed hearing. The remainder of the hearing should be held in open court.

The use of these time-tested judicial tools in this case is a far wiser course of action than compromising the constitutional rights of access based on speculative and unsubstantiated assertions of prejudice. Because such less restrictive alternatives to closure are available, Mr. Jeffs cannot satisfy his constitutional burden to close his pretrial suppression hearing and seal the court file. Accordingly, under the governing constitutional standard, the Court should unseal the documents that have been placed under seal in this case.

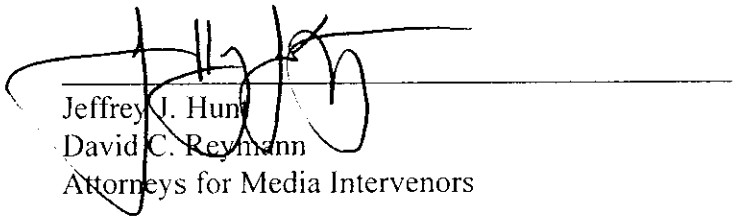
CONCLUSION

There are unusual cases where the public's right of access must yield to an imminent and specific threat to an accused's right to a fair trial. "Such circumstances will be rare, however, and the balance of interest must be struck with special care." *Waller,* 467 U.S. at 44. This is not one of those extraordinary cases. Mr. Jeffs has not shown that public access will irretrievably

prejudice his right to a fair trial, or that the evidence he seeks to seal is more than cumulative of the massive amount of information already in the public domain. Nor has he shown that the numerous less restrictive alternatives at this Court's disposal will be insufficient to protect his fair trial rights. As a result, he has failed to carry his burden of overcoming the public's constitutional right of access. The hearing on Mr. Jeffs' motions in limine should remain public, and the motions and memoranda filed in connection with that hearing should be unsealed.

RESPECTFULLY SUBMITTED this 12 day of July 2007.

PARR WADDOUPS BROWN GEE & LOVELESS



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of July 2007, a true and correct copy of the foregoing **MEDIA INTERVENORS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR CLOSURE OF DEFENDANT'S MOTIONS IN LIMINE AND SUPPRESSION HEARINGS** was sent via facsimile (without exhibits) and United States mail, postage prepaid (with exhibits), to:

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